IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 17, 2008 Session

STEPHANIE JAN CLIFTON SOLIMA v. DAVID JOHN SOLIMA

Appeal from the Circuit Court for Williamson County
No. 04229 Robert E. Lee Davies, Judge

No. M2008-00528-COA-R3-CV - Filed November 20, 2008

Father appeals criminal contempt conviction for failure to abide by provision in Parenting Plan Order governing summer residential time with minor son. According to Father, the Parenting Plan was ambiguous so that the length of his summer residential period with his son was unclear. Finding that the provision in the Parenting Plan Order was clear, specific, and unambiguous, we affirm Father's contempt conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Kenneth James Sanney, Brentwood, Tennessee, for the appellant, David Solima.

John J. Hollins, Jr., Sarah S. Richter, Nashville, Tennessee, for the appellee, Stephanie Jan Clifton Solima.

OPINION

Mr. Solima appeals his criminal contempt conviction for failure to comply with the residential provisions in the Parenting Plan entered by the court. The Solimas were divorced in 2006. The Permanent Parenting Plan Order dated August 31, 2006, described the residential time the couple's minor son was to spend with each parent.

The record reflects that after the divorce, it became necessary for Mrs. Solima to petition the court to require compliance with Mr. Solima's alimony and child support obligations. On April 9, 2007, the trial court found him guilty of willful criminal contempt for failure to pay several months of alimony and for late payment of child support. He was sentenced to 69 days of incarceration. His sentence, however, was suspended provided he complied with all previous court orders. Apparently, Mr. Solima complied and, responding to Mr. Solima's motion, the trial court in October of 2007

provided that Mr. Solima was on "unsupervised probation for the entirety of his sentence." These findings of criminal contempt are not the subject of this appeal.

In September of 2007, Mrs. Solima filed a Second Petition for Criminal Contempt, which included among other things, the following allegation:

> 22. On August 31, 2006, the Honorable Russ Heldman, Judge of the Circuit Court for Williamson County, Tennessee, entered an Amended Final Decree for Divorce which incorporated a Permanent Parenting Plan which provides in part as follows:
>
> > **G. SUMMER VACATION**
> >
> > The day-to-day schedule shall apply except as follows: The Father shall have 49 consecutive days of summer vacation beginning the day after the child is dismissed from school. During this 49-day period, the Mother shall have visitation with the minor child every other Thursday evening from 5:00 p.m. to the following Sunday evening at 5:00 p.m.
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> The minor child was dismissed from school for summer vacation on May 26, 2007. Mr. Solima picked up the minor child and began his summer visitation of 49 consecutive days with the minor child at 5:00 p.m. on May 27, 2007. The 49 [days] of consecutive visitation ended on July 12, 2007 at 5:00 p.m. Mr. Solima failed and refused to return the minor child to Ms. Solima on July 12, 2007 at 5:00 p.m. In fact, Mr. Solima kept the minor child for an additional 6 day period and refused to communicate to Ms. Solima when he planned to return the minor child to the mother. A calendar verifying the 49 days of summer visitation is attached hereto as Exhibit 1.
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> 23. Mr. Solima is guilty of willful criminal contempt in violation of Tenn. Code Ann. § 29-9-101, 102, 103, 104, and 105 for his failure to return the minor child to Ms. Solima on July 12, 2007 which was 49 days after his summer visitation began. Mr. Solima should be incarcerated for a period of ten (10) days for each willful violation of the court's order.

After a hearing on Mrs. Solima's petition, in its order dated February 5, 2008, the trial court found as follows:

> Mr. Solima is guilty of willful criminal contempt for keeping the minor child of the parties for an additional six day period following his 49 consecutive days of summer vacation. The Court's Order is perfectly clear that Mr. Solima has 49 days, no more, no less of summer vacation. To add on July 4th, birthdays and things like that is plainly absurd. Mr. Solima is sentenced to ten (10) days in jail for willful contempt.

> The Court finds Mr. Solima guilty beyond a reasonable doubt. Upon motion of counsel for Mr. Solima, Mr. Solima's appeal bond is set at $2,500.

Mr. Solima appeals his February 2008 conviction and sentence for criminal contempt arguing that the language in the Parenting Plan was ambiguous so that his failure to comply with it cannot form the basis of criminal contempt. Mr. Solima does not deny that he kept his son more than 49 days. Mrs. Solima seeks to be awarded her attorney fees arising from this appeal.

II. CRIMINAL CONTEMPT

Our courts may impose contempt sanctions for willful disobedience of "any lawful writ, process, order, rule, decree, or command." Tenn. Code Ann. § 29-9-102(3). Because of the punitive purpose of proceedings for criminal, as distinguished from civil contempt, *see Black v. Blount*, 938 S.W.2d 394, 398 (Tenn. 1996), such proceedings are considered quasi-criminal and require the courts to accord defendants many (although not all) of the constitutional rights that criminal defendants are ordinarily entitled to, including the requirement that their guilt be proved beyond a reasonable doubt. *Strunk v. Lewis Coal Corp.*, 547 S.W.2d 252, 253 (Tenn. Crim. App. 1976) *(*citing *Shiflet v. State*, 400 S.W.2d 542, 544 (Tenn. 1966)).

Civil contempt and criminal contempt do not necessarily differ in the kinds of behavior sanctioned, but rather in the purposes for which the sanctions are imposed and the corresponding nature of their respective penalties. Our Supreme Court described these two types of contempt as follows in *Black v. Blount*:

> Civil contempt occurs when a person refuses or fails to comply with a court order and a contempt action is brought to enforce private rights. *Robinson v. Air Draulics Engineering Co.*, 214 Tenn. 30, 37, 377 S.W.2d 908, 911 (1964). If imprisonment is ordered in a civil contempt case, it is remedial and coercive in character, designed to compel the contemnor to comply with the court's order. Compliance will result in immediate release from prison. Therefore, it has often been said that in a civil contempt case, the contemnor "carries the keys to his prison in his own pocket...." *State ex rel. Anderson v. Daugherty,* 137 Tenn. 125, 127, 191 S.W. 974 (1917); *see also State v. Turner,* 914 S.W.2d 951, 955 (Tenn. Crim. App. 1995).
>
> Criminal contempts, on the other hand, are intended to preserve the power and vindicate the dignity and authority of the law, and the court as an organ of society. *Daugherty,* 137 Tenn. at 127, 191 S.W. at 974; *Gunn v. Southern Bell Tel. & Tel. Co.*, 201 Tenn. 38, 41-42, 296 S.W.2d 843, 844-45 (1956). Therefore, sanctions for criminal contempt are generally both punitive and unconditional in nature. *Id.* While criminal contempts may arise in the course of private civil litigation, such proceedings, "in a very true sense raise an issue between the public and the accused." *Daugherty,* 191 S.W. at 974. In the trial of a criminal contempt case, therefore, guilt

> of the accused must be established by proof beyond a reasonable doubt. *Robinson,* 377 S.W.2d at 912.

Black, 938 S.W.2d at 398.

In *Konvalinka v. Chattanooga-Hamilton County Hospital Authority*, 249 S.W.3d 346 (Tenn. 2008), the Supreme Court recently addressed the contempt power of the courts. The power to punish for contempt is essential for the proper administration of justice and Tenn. Code Ann. § 29-9-102(3) specifically "enables the courts to maintain the integrity of their orders." *Id*. at 354.

In order to be found in contempt for violation of a court order, the Supreme Court in *Konvalinka* found that there must be an actual willful violation of a lawful, unambiguous court order.[1] *Id*. at 354-55. Of particular importance to this case is the Court's discussion involving the requirement that the court order in question be clear, specific and unambiguous:

> A person may not be held in civil contempt for violating an order unless the order expressly and precisely spells out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden.
>
> Vague or ambiguous orders that are susceptible to more than one reasonable interpretation cannot support a finding of civil contempt. Orders need not be "full of superfluous terms and specifications adequate to counter any flight of fancy a contemner may imagine in order to declare it vague." They must, however, leave no reasonable basis for doubt regarding their meaning.
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> Orders alleged to have been violated should be construed using an objective standard that takes into account both the language of the order and the circumstances surrounding the issuance of the order, including the audience to whom the order is addressed. Ambiguities in an order alleged to have been violated should be interpreted in favor of the person facing the contempt charge. Determining whether an order is sufficiently free from ambiguity to be enforced in a contempt proceeding is a legal inquiry that is subject to *de novo* review.

Id. at 355-358 (citations omitted).

The Court in *Konvalinka* also provided guidance about how a court order should be viewed:

> Orders, like other written instruments, should be enforced according to their plain meaning. Thus, courts called upon to interpret orders should construe the language

[1] While the discussion in *Konvalinka* related to findings of civil contempt, the requirement for clarity should not be different in criminal contempt cases since both types of contempt sanctions can be imposed for willful disobedience of a lawful order or decree.

> in the order in light of its usual, natural, and ordinary meaning. If the language in an order is clear, then the literal meaning of the language in the order controls. Litigants are entitled to rely on the reasonable interpretation of orders, and the use of the "plain and ordinary meaning" standard to interpret orders assures that litigants will be treated fairly.

249 S.W.3d at 359 (citations omitted).

III. ANALYSIS

According to Mr. Solima, the trial court erred in holding him in criminal contempt because the Parenting Plan Order is ambiguous with regard to his parenting time.

We disagree as to the provision governing the child's residential schedule for summer. Section G awarding Mr. Solima residential time in the summer is clear, specific, and unambiguous. First, it provides that the day-to-day schedule shall not apply during Father's 49 day summer residential time with the child. Second, it provides that Father's summer residential time is consecutive, *i.e.*, it cannot be taken intermittently during the summer. Third, Father's summer residential time is to begin the day after the child is dismissed from school. Finally, "during this 49 day period," Mother has the child for a long week-end every other week.

According to Mr. Solima on appeal, the Parenting Plan Order is ambiguous in three respects. First, Mr. Solima argues that the term "consecutive" is inconsistent with granting Mrs. Solima visitation during the period. The order, however, is clear that Mrs. Solima has visitation "during this 49 day period." Second, Mr. Solima argues that any holiday awarded to him that fell within the 49-day period must be added to the 49-day period. For instance, the Order provided whoever has the child the weekend of Memorial Day would have the child on Memorial Day and provided that Father is to have the child on Father's birthday. Since both of these days fell within Mr. Solima's 49-day period, he argues that these two days should be added to his 49-day summer residential period. The trial court found this convoluted reasoning "patently absurd." We also find no merit in the argument. Under Mr. Solima's reasoning, any holiday awarded Mrs. Solima during the 49-day period extended Mr. Solima's time and any holiday awarded Mr. Solima during the 49-day period also extended Mr. Solima's time. Third, both parties concede that the total yearly days allocated to each party in the Section A, "Residential Time With Each Party" provision in the Parents Plan Order is incorrect.[2] According to Father, this creates an ambiguity that affects the summer residential time described in Section G. Whatever ambiguity may exist elsewhere in the Order, Subsection G is clear and unambiguous regarding the 49 day period, and Mr. Solima decided not to comply therewith at his peril.

[2]The Order provides that Mother has 244 days and Father has 121 days. However one construes the residential time allocated to the parents under the Parenting Plan Order, these numbers are not correct.

Mr. Solima does not argue any other defects in the criminal contempt proceedings. However, we note that there is a mediation provision in Section V of the Parenting Plan[3] which requires the parents to submit disagreements about the Parenting Plan Order (other than issues of financial support or abuse) to mediation "before returning to Court." Mr. Solima raised the failure by Mrs. Solima to submit this dispute to mediation as a defense to contempt at the trial court level. The trial court found that failure to mediate is not a defense to criminal contempt. Mr. Solima has not raised the mediation issue on appeal. In any event, it does not appear likely that a parent who willfully failed to comply with a clear provision of a Parenting Plan Order may raise mediation as a shield or a delay tactic in criminal contempt proceedings.

That is not to say, however, that the parties were not obligated to seek mediation over the interpretation of the Parenting Plan provisions. The parties and their attorneys disagreed as to the correct calculation of the duration of the father's residential parenting time in the summer. It appears to us this would have been an appropriate issue to mediate. However, neither party chose to pursue that route. By the time the petition for contempt was filed, Mr. Solima lost his right to insist on mediation as a prerequisite to the contempt proceeding. While this court may have concerns about the propriety of seeking a contempt finding two months after the allegedly contemptuous act took place and in view of the fact the parties' attorneys disagreed as to the date for return of the child, it is not our prerogative to second guess the trial court on that basis.

Mr. Solima also argues that his 10 day sentence for criminal contempt should be reduced. He asks for a reduction on the ground that he acted in good faith because his actions were based on his attorney's advice. The trial court, however, clearly did not believe that Mr. Solima acted in good faith:

> With regard to the summer visitation, the order is perfectly clear that Mr. Solima has 49 days; no more, no less. To add on July 4th, birthdays and things like that is patently absurd. I find you in willful contempt for playing games on your visitation. I sentence you to ten days in jail for that willful contempt.
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> That's the kind of stuff I really don't care to deal with. I'm doing this so you won't do this again. I don't want to deal with this kind of tomfoolery stuff like this again. And anybody else that comes in this courtroom and plays these kind of games, I'm going to pop it to them - - (inaudible). With regard to the telephone calls, I cannot find beyond a reasonable doubt that you didn't return them. I suspect that you didn't. And if I get a stronger case, I'll be sure to deal with that. That's my order.

We decline to revise the sentence imposed by the trial court.

[3]The Amended Final Decree likewise ordered mediation for "any parenting issue."

Finally, Mrs. Solima requests that she be awarded her attorneys' fees on appeal. Given that the appeal involves a criminal conviction for which Mr. Solima must serve a jail sentence, we do not find the appeal to be frivolous or otherwise merit an award of fees.

The trial court is affirmed.[4] Costs of appeal are taxed to the appellant, David Solima, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.

[4]This office received by mail a correspondence postmarked November 6, 2008, in which the sender failed to identify himself/herself. The correspondence consisted solely of a copy of a purported letter dated July 11, 2008, from Kenneth Sanney to John Hollins, Jr. about this case. This clearly *ex parte* communication was not a part of the record on appeal, and we have not considered it.